Exhibit #9

Loretta,
Prior to printing, can you correct the footnote at the bottom of page two: It should read September 21, 2000 (not October 12, 2000). Thanks, Jim

A corrected version is attached.

My name is James Ellenberger and I am a consultant to the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE). PACE represents some 320,000 workers nationwide in oil, chemical, pulp, paper, auto parts and nuclear industries. We represent workers at eleven Department of Energy sites in the DOE nuclear complex and workers at a number of current and former beryllium and other atomic weapons suppliers.

I also serve as a member of the Worker Advocacy Advisory Committee to the Department of Energy. This committee, appointed by the Secretary of Energy, was created to advise the Department on its responsibilities under Subtitle D of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

I am also a recognized expert on workers' compensation, having served as the principal representative on that issue for the national AFL-CIO for nearly two decades. I am one of the founding members of the National Academy of Social Insurance, and serve on its workers' compensation steering committee.

To say that PACE International Union is disappointed in the Proposed Rule published in the ***Federal Register*** on September 7, 2001 would be a huge understatement. As we indicated in a statement on September 10, PACE is outraged with the direction the Department has taken on the "Guidelines for Physicians Panel Determinations on Worker Requests for Assistance in Filing for State Workers' Compensation Benefits." The proposed rule has the Department in full retreat from its previous commitment to assist its

contractor employees, who were made sick from working in the nation's nuclear weapons complex and who are not covered under the Federal program administered by the U.S. Department of Labor, in obtaining state workers' compensation benefits.

Over the past several years both the Congress and the DOE found that existing workers' compensation programs have failed to provide for the needs of these workers and their families due to a variety of roadblocks erected by the state programs. This was the genesis of the action taken by Congress to provide benefits for those workers made sick by their exposure to radiation, beryllium, and silica. There was recognition that the Federal program would not begin to adequately compensate for these conditions and illnesses from exposure to other toxic substances.

Under Subtitle D of EEOICPA, Congress directed the Secretary of Energy to assist contractor employees, whose illness or death may have been related to employment at a DOE facility, in filing claims under the appropriate state workers' compensation program. Importantly, the Secretary of Energy was not permitted to oppose legitimate claims and was given important powers to ensure that DOE contractors would not fight these claims. In hearings on this issue, Congresswoman Marcy Kaptur pointed out:

> Finally, the Department would establish an Office of Worker Advocacy within the Office of Environment, Safety and Health to help workers with illnesses not specifically addressed in the legislative proposal obtain state workers' compensation benefits. This Office has been established and is already working closely with state offices to compensate workers whose illnesses were clearly identified as being work-related by occupational physicians. In additional, Secretary Richardson has directed all DOE contractors to reverse its policy of opposing the valid claims made by these workers.[1]

[1] Judiciary Committee Hearing, September 21, 2000. Available at: http://commdocs.hous.gov/committees/judiciary/hju67346.000/hju67346_Of.htm

Incredibly, these rules circumvent the intent of Congress. In its most amazing instance of backsliding, the proposed rules permit the Department of Energy to block the submission of cases to the physician panels established under the Act. As we have said previously, the DOE has no business interpreting state laws. To do so would put them in the absurd position of endorsing the denial of claims that the law intended contractors be encourage to pay. While we have substantive comments on all aspects of the proposed rule, our testimony will focus on the most egregious instances where the Department of Energy has strayed from and misconstrued the intent of the law that has been delegated to it by the Congress.

1. Agreements authorized with the States

The Department of Energy has seriously misinterpreted the responsibilities that Congress placed on its shoulders under Subtitle D. The "Agreements with States," as called for in Sec. 3661(a) of the statute, are for the purpose of permitting the Department to provide assistance to DOE contractor employees in filing claims under a state's workers' compensation law. Such agreements are to give DOE "standing" with a state to enable the Department to provide assistance to its contractor employees who may have a claim under that state's workers' compensation law.

Section 852.2 of the proposed rule perverts this simple task by defining such agreements as "setting forth the terms and conditions for dealing with an application for assistance." The Act requires the Department to work out details with the states so that the DOE can provide assistance to the employees of its contractors. The Act does <u>not</u>

ask, order or permit the Department to negotiate with the states to "set forth the terms and conditions for dealing with" applications. These agreements with the states should not get into the details of how applications are dealt with – they should simply be an agreement between the Secretary and a state that permits the DOE to provide assistance to claimants and to establish procedures for such assistance.

2. Satisfying State Criteria

The simple question is: where in the statute is the Department of Energy charged with "screening" claims or interpreting state "criteria" for the consideration or admissibility of claims?

Incredibly, the Department proposes a system that would enable DOE to block the submission of cases to the physicians panels (for a determination of medical causation) on the basis of the Department's assessment as to whether the claim will "satisfy" state criteria for the determination of a valid claim. §856.6 of the proposed rule provides that agreements with the states must contain provisions that limit which cases DOE will be permitted to forward to the physician panels. This means that DOE will be in the business of interpreting state laws. This would put the Department in the absurd position of endorsing the denial of claims that the law intended its contractors be encouraged to pay.

To make matters worse, the Department, in §852.11(c)(4), instructs the physicians panel, on request, to issue a finding as to whether the specified state criteria is satisfied. Here the Department demonstrates its total misunderstanding of state workers'

compensation law and practice. Doctors, whether they are treating physicians or reviewing physicians, are never asked to interpret state law. All state systems recognize and accept that physicians are trained and capable of issuing findings as to causality. None of them rely on physicians to make findings as to compensability. This fact is understood by the Congress but grossly misunderstood by the Department of Energy.

The law, under Sec. 3661(b)(2) simply and plainly instructs the Department to make two determinations. The first is whether the applicant has submitted "reasonable evidence" that the claim was filed by or on behalf of a DOE contractor employee. The second is whether or not the illness or death may have been related to employment in a DOE facility.

Decades of experience with state workers' compensation laws on the "admissibility" of occupational illness claims have clearly demonstrated that states have erected numerous blocks and hurdles to these claims. The Congress did not ask the DOE to block cases on these "criteria" – they did just the opposite. If the DOE has an agreement with a state and if reasonable evidence exists that the worker's condition may have been related to employment, then the Department is obligated to submit the case to a physician panel and is obligated to assist the worker in obtaining additional evidence within the control of the DOE and evidence relevant to the panel's deliberations.

3. Panel Determinations

The Department has needlessly introduced confusing legal issues in its explanation as to how a physician panel will determine whether the illness or death "arose out of and in the course of employment." The panel should not be looking for

"prima facie" cases or attempting to find conditions which meet some sort of "more likely than not" or "as likely as not" standard that the employment "caused" the illness or death. It would be far more helpful and correct for the Department to stipulate that physician panels, in determining the "arising out of and in the course of" question, should consider all exposures to toxic substances at DOE facilities that contributed, exacerbated, aggravated, or caused the illness or death.

4. Re-examination of Panel Determinations

Under Subtitle D, and if provided in an agreement with the state, the Department is allowed to review a panel's determination. Specifically, such review is limited to information the panel considered in making its determination, to relevant new information not reasonably available at the time of the panel's deliberations, and the basis used by the panel to reach its determination.

The Department, under § 852.15, proposes an additional array of circumstances that would permit the Program Office to order that specific cases be re-examined by the original physicians panel, or an entirely new panel. Such circumstances, according to DOE, could include the need for quality assurance, any situation the Program Office deems would constitutes "good cause," doubt by the Program Office that evidence supports the panel's determination, conflict of interest, and the need for "consistency." This is unreasonable and unacceptable. The Act very clearly limits the Secretary's review of panel determinations to certain situations. DOE's proposed rules are far too broad and would permit the Department to review virtually any panel determination.

Congress did not intend for the Department to continue its negative actions in dealing with contractor employees made sick from their work. That is why the statute limits the Secretary's actions in reversing a panel's determination to those situations where there is "significant evidence to the contrary."

5. Assistance to Claimants

Subtitle D, Sec. 3661(c), requires the Secretary to assist the employee in obtaining additional evidence within its control and relevant to the physician panel's deliberations. Yet DOE has written and proposed rules that studiously avoid any mention of how the Department will extend assistance to claimants in obtaining evidence or presenting relevant information to aid in the physician panel's deliberations.

DOE seems to think that their responsibility under this section is limited to describing where an individual can get an application and how it is to be submitted. There is no mention in the rules of what form or substance the "assistance" the Congress directed the Department to extend to the employee is to be given. Rather than admit to burdens that it must fulfill, the Department describes in the preamble the requirements it is leveling on employees to provide signed medical releases for medical records, employment histories and other information. The DOE is careful not to place any burden on itself to actually aid workers in the submission of applications to the panels.

When the Department finally does admit to its responsibility under Sec. 3661(e) to assist applicants, whose cases have been approved by a physician panel, to file a claim under the appropriate State workers' compensation system, it is a promise of assistance

that is devoid of meaning. It is an empty promise of assistance because of the "screening" procedures that permits that Department to block submission of claims to the physician panels. Even for those that make it to the physician panels, the Department can require physicians to make "legal" determinations of state law to further block claims. If a claim were to ever make it through this process, the Department's promise of assistance is still empty because it has taken no steps to ensure the payment of these claims.

It is the view of PACE International Union that the Department of Energy has missed the intent of Congress in the rules it has proposed to 10 CFR 852. The Department should revisit the legislative history of the Energy Employees Occupational Illness Compensation Program Act, the findings and sense of Congress in that Act, and, in particular, the language of Subtitle D of the Act. The Department should reissue rules to provide guidelines for the operation of physician panels and to detail the assistance it will provide workers who are filing for state workers' compensation benefits. The Department needs to make clear how it will pay for these claims and how it will ensure that these awards are not contested by either the Department or its contractors.

Thank you.